



FEDERAL ELECTION COMMISSION
Washington, DC 20463

William J. McGinley, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

OCT 9 2009

RE: MUR 6164
Friends of Mike Sodrel and Gregory M.
Fitzloff, in his official capacity as treasurer

Dear Mr. McGinley:

On February 3, 2009, the Federal Election Commission notified your clients, the Friends of Mike Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer, ("Committee") of a complaint alleging that the Committee may have violated certain sections of the Federal Election Campaign Act of 1971, as amended. On September 10, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe that the Committee violated 2 U.S.C. § 441a by receiving excessive contributions or failed to report contributions in violation of 2 U.S.C. 434 based on allegedly coordinated communications. Accordingly, the Commission closed its file in this matter on October 1, 2009.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Michael Columbo, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Mike Sodrel **MUR 6164**
Friends of Mike Sodrel
and Gregory Fitzloff,
in his official capacity as treasurer

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Brian L. Wolff, on behalf of the Democratic Congressional Campaign Committee. *See* 2 U.S.C. § 437g(a)(1).

II. INTRODUCTION

The complaint alleges that Mike Sodrel ("Sodrel"), the Friends of Mike Sodrel, Sodrel's principal campaign committee for his 2004 and 2006 congressional campaigns in Indiana's 9th Congressional District, and Gregory M. Fitzloff, in his official capacity as treasurer ("FMS"), coordinated communications with Citizens for Truth ("CFT") as well as the Economic Freedom Fund ("EFF"). The allegedly coordinated communications involved radio ads, billboards, and robocalls advocating for the defeat of Baron Hill, Mike Sodrel's opponent in the 2004 and 2006 general elections. In support of the allegations, the complaint included phone records purportedly showing calls between individuals associated with FMS, CFT, and EFF. *See* Complaint at Attachment A. The complaint alleges that Sodrel thereby knowingly accepted, excessive contributions in violation of 2 U.S.C. § 441a. *See* Complaint at 4-5.

Additionally, the Complaint alleged that FMS failed to disclose the contributions and expenditures associated with the allegedly coordinated communications in violation of 2 U.S.C. § 434. *See* Complaint at 5-6.

1 A prior matter, MUR 5845 (Citizens for Truth), was generated by a complaint filed by
2 the Indiana Democratic Party that alleged that FMS and CFT coordinated their communications
3 during the 2004 election cycle. In that matter, the Commission found no reason to believe and
4 closed the file because there was insufficient information available to support the allegations,
5 including the fact that the complaint identified no communications. See MUR 5845 (Citizens for
6 Truth) Factual and Legal Analysis at 8. In contrast to MUR 5845, the MUR 6164 complaint
7 alleges activity in both the 2004 and 2006 election cycles.

8 Based on the information provided in the complaint and the response to the complaint,
9 and for the same reasons present in MUR 5845, that is, a lack of information that would satisfy
10 the coordinated communications test at 11 C.F.R. § 109.21, the Commission finds no reason to
11 believe that Mike Sodrel or the Friends of Mike Sodrel violated 2 U.S.C. § 441a by knowingly
12 receiving excessive contributions from Citizens for Truth and the Economic Freedom Fund.
13 Because the available information does not indicate that CFT or EFF and FMS may have
14 coordinated communications, the Commission finds no reason to believe that Mike Sodrel or the
15 Friends of Mike Sodrel failed to disclose the allegedly coordinated communications as
16 contributions and expenditures in violation of 2 U.S.C. § 434.

17 **III. FACTUAL SUMMARY**

18 Mike Sodrel and Baron Hill have repeatedly challenged one another in elections for the
19 seat in the House of Representatives representing Indiana's Ninth Congressional District.
20 Complaint at 2. Hill first won election in 1998, successfully defended a challenge from Sodrel in
21 2002, lost to Sodrel in 2004, regained the seat in 2006, and, most recently, defeated Sodrel's
22 challenge in 2008. *Id.*

1 CFT is a section 527 organization founded in 2004 by Bud Bernitt, who serves as its
2 President.¹ *Id.* The complaint alleges, on "information and belief," that Bernitt "more or less"
3 exclusively controls CFT and uses it to attack Rep. Hill. *Id.* According to the Complaint, all of
4 CFT's activities have been attacks on Rep. Hill. *Id.* Citing CFT's own statements on the CFT
5 website, the complaint alleges that in 2004 CFT "released hundreds of ads attacking Hill, and
6 sponsored 38 billboards" and in 2006 aired radio advertisements and sponsored billboards
7 attacking Hill in 2006. *Id.* The complaint does not include a transcript of any of the alleged
8 radio ads but instead refers to a "sample ad" on the CFT website. *Id.* The CFT website includes
9 an audio recording and transcript for one radio ad called "Baron the Dodger" that, according to a
10 CFT press release, was broadcast in October 2004. *See*
11 www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm. The complaint alleges that, "on
12 information and belief," CFT spent "more than \$10,000" on radio ads "attacking Hill" in 2004
13 and 2006. There are no descriptions of the billboards in the complaint. *Id.* The CFT website
14 also has no information about billboards.

15 On its website, CFT describes itself as follows:

16 Citizens for Truth (CFT) is committed to promoting Hoosier family values and
17 educating Hoosiers on issues relating to those values. CFT is a "527" political
18 group dedicated to informing the people of Indiana on the voting records, issue
19 positions, actions and public statements of elected officials and candidates for
20 public office.

21
22 <http://www.citizensfortruth.com/aboutus/>.
23

¹ Section 527 organizations refer to organizations that file with the Internal Revenue Service under Section 527 of the Internal Revenue Code.

1 **IV. ANALYSIS**

2
3 **A. Alleged Coordination Between Citizens for Truth and Sodrel or Friends of**
4 **Mike Sodrel**

5
6 The complaint asserts that CFT coordinated its communications, radio ads and billboards,
7 with Sodrel or FMS in 2004 and 2006. The Act provides that expenditures by any person “in
8 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
9 authorized political committees or their agents” constitute in-kind contributions to the
10 candidate’s authorized committee. 2 U.S.C. § 441a(a)(7)(B)(i). A payment for a coordinated
11 communication must be reported as an expenditure made by that candidate’s authorized
12 committee. 11 C.F.R. § 109.21(b)(1). In addition, as an in-kind contribution, the costs of a
13 coordinated communication must not exceed a political committee’s applicable contribution
14 limits. See 2 U.S.C. § 441a.

15 To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a
16 three-pronged test: (1) the communication must be paid for by a person other than a federal
17 candidate, a candidate’s authorized committee, or any agent of either of the foregoing; (2) one or
18 more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3)
19 one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. See
20 11 C.F.R. § 109.21(a).

21 **1. Billboards**

22
23 The complaint asserts that CFT coordinated its payment for billboards with Sodrel or
24 FMS in 2004 and 2006. However, the complaint contained no descriptions of the allegedly
25 coordinated billboards but rather merely noted that CFT referred to billboards on its website. See
26 Complaint at 2. The Commission located a press release on the CFT website dated March 27,
27 2006 that states “Citizens for Truth ran radio advertisements, erected billboards and posted

1 www.WhereIsBaron.com during the 2004 election cycle to educate people about Baron Hill's
2 positions on key issues of concern to Hoosiers." See
3 www.citizensfortruth.com/pressreleases/pr032706.shtml. A press release dated October 23,
4 2004, on the CFT website states that WhereIsBaron.com "released 38 new billboards and a
5 website to help Hoosier voters learn more about the elusive Congressman's liberal voting
6 record" and that the "issues-based WhereIsBaron.com billboard campaign begins today in
7 counties throughout Southern Indiana." See www.citizensfortruth.com/whereisbaron/PR-38-
8 billboards.htm. In its 2004 filings with the Internal Revenue Service, CFT disclosed spending
9 \$6780 on October 21, 2004 for "Billboard Sales." See CFT IRS Form 8872 (dated December 1,
10 2004).

11 Billboards are public communications. See 2 U.S.C. § 431(22). Because CFT's October
12 2004 billboards concerned Rep. Hill's voting record, they presumably identified Rep. Hill. Even
13 assuming, *arguendo*, that the billboards were public communications that clearly identified a
14 federal candidate in the candidate's jurisdiction, and otherwise satisfied at least one of the
15 content standards in 11 C.F.R. § 109.21(c), the coordinating conduct alleged in the complaint
16 took place in 2006 and there is no information about alleged coordinating conduct in 2004. CFT
17 also reported to the Internal Revenue Service that it paid a media consultant \$5,915 on
18 October 10, 2006, and \$2,630 on October 17, 2006, for "billboards." See CFT IRS Form 8872
19 (dated December 5, 2006). However, there is no available information concerning the content of
20 CFT's 2006 billboards.

21 Based on the available information, the allegations with respect to CFT's 2004 and 2006
22 billboard buys are not sufficient to warrant an investigation into whether the conduct and content

standards, see 11 C.F.R. § 109.21(c) and (d), of the coordinated communications test have been met.

2. *Radio Ads*

The complaint included no radio ad transcripts or dates of their broadcast. It referred only to a "sample ad" on the CFT website. See Complaint at 2-4. A press release on the CFT website dated October 27, 2004, states that CFT's WhereIsBaron.com released "hundreds of new 60 second radio ads throughout southern Indiana to help Hoosier voters learn more about the elusive Congressman's liberal voting record." See www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm. A press release dated October 29, 2004, on the CFT website refers to CFT "issue ads" that were being aired on "over a dozen" radio stations. See www.citizensfortruth.com/whereisbaron/PR-radio-intimidator.htm. The press releases included a link to listen to an ad called "Baron the Dodger" and the October 27, 2004, press release included a transcript of the ad. The transcript of the ad is as follows:

Why has Baron Hill dodged all but one debate? Maybe it's because he doesn't want you to know that he voted twice against protecting the American flag from people who want to burn it. Or could it be that Baron wants to keep it a secret that he voted to give preferential trade status to Communist China. Maybe Baron is worried that you'll find out that he voted against ending the burdensome death tax that devastates so many families after the death of a loved one. It might surprise you to learn that Baron voted against protecting traditional marriage from activist liberal judges. In fact, Baron voted no to military border patrols that would have protected us from drugs and terrorism. Did you know that Baron even voted against keeping God in the Pledge of Allegiance. No wonder Baron doesn't want to debate the issues. He's afraid we'll find out how liberal he really is. To learn more about Baron Hill's sneaky liberal agenda, visit WhereisBaron.com. Paid for and approved by Citizens for Truth. Not affiliated with any candidate or political party.

See www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm.

The "Baron the Dodger" radio ad is the only radio ad on the CFT website. The complaint included no further information, and none was found on the CFT website, regarding other CFT

1 radio ads in 2004 or any radio ads in the 2006 election. Thus, the only CFT communication
2 which can be analyzed under the coordinated communications test is the 2004 Baron the Dodger
3 ad.

4 a. Payment Prong

5 As to the first prong of the coordination test, the complaint asserts that CFT paid for radio
6 ads and billboards in the 2004 election cycle. See Complaint at 2. As noted above, the Baron the
7 Dodger ad is a CFT radio ad that was broadcast in October 2004. Thus, it appears that CFT may
8 have paid for a communication in 2004, satisfying the first prong of the coordination test. See
9 11 C.F.R. § 109.21(a)(1).

10 b. Content Prong

11 At all times relevant to this matter, the second or "content" prong of the coordination test
12 was satisfied if the communications at issue met at least one of four content standards: (1) a
13 communication that was an electioneering communication as defined in 11 C.F.R. § 100.29; (2) a
14 public communication that republished, disseminated, or distributed candidate campaign
15 materials; (3) a public communication containing express advocacy; or (4) a public
16 communication, in relevant part, that referred to a clearly identified Federal candidate, publicly
17 distributed or disseminated 120 days or fewer before a primary or general election, and was

1 directed to voters in the jurisdiction of the clearly identified candidate. See 11 C.F.R.

2 § 109.21(c).² The “Baron the Dodger” radio ad satisfied the last of these standards.

3 The Baron the Dodger radio ad was a public communication, see 2 U.S.C. § 431(22),
4 referring to Baron Hill, a clearly identified federal candidate, see 2 U.S.C. § 431(18), publicly
5 distributed or disseminated in October 2004, which was 120 days or fewer before a general
6 election, and it was directed to voters in the jurisdiction of the clearly identified candidate.
7 Accordingly, the ad satisfies the content prong of the coordinated communications test. See 11
8 C.F.R. § 109.21(c).

9 c. Conduct Prong

10 The Commission’s regulations set forth six types of conduct between the payor and the
11 recipient committee, whether or not there is agreement or formal collaboration, that can satisfy
12 the conduct prong. See 11 C.F.R. § 109.21(d). To meet the conduct prong of the coordination
13 communication test, the communication must have been made at the request or suggestion of the

² In response to the decision in *Shays v. F.E.C.*, 414 F.3d 76 (D.C. Cir. 2005) (“*Shays I*”), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. See Final Rules and Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). The amended regulations, among other things, reduced the pre-election window during which certain communications that refer to a clearly identified House or Senate candidate are publicly distributed or otherwise publicly disseminated from 120 to 90 days. See 11 C.F.R. § 109.21(c)(4)(i) (2007). Subsequently, in *Shays III*, the U.S. District Court for the District of Columbia held that the Commission’s revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties’ motions for summary judgment). Subsequently, the D.C. Circuit affirmed the district court regarding the invalidity of the current standard for public communications made outside the timeframes specified in the standard. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

The activity at issue in this matter occurred before the July 10, 2006 effective date of the revisions to Section 109.21. Accordingly, all citations to the Commission’s regulations refer to them as they existed prior to that date. Notably, the revisions would not appear to change the result in this matter even if they were applied retroactively. CFT’s “Baron the Dodger” radio ad was broadcast in October 2004 which was within the shortened 90-day time frame in the revised regulations (based on the November 2, 2004 general election, the 90-day period would start on August 4 and the 120-day period would start on July 5).

1 Federal candidate, with some material involvement by the Federal candidate, as a result of
2 substantial discussions with the Federal candidate, or through the use of a common vendor,
3 employee or independent contractor that the Federal candidate also used within certain
4 timeframes. 11 C.F.R. § 109.21(d).

5 The complaint asserts that there is “overwhelming” evidence of coordination between
6 CFT and Sodrel. See Complaint at 4. In support of this contention the complaint offers only two
7 suppositions: that CFT was formed only to attack Hill which, the complaint asserted, is “rare” or
8 “unprecedented” for a 527 organization; and that Bernitt made 71 “contacts” with Sodrel or his
9 associates in the 67 days leading up to the 2006 election. See Complaint at 4 and Attachment A.

10 The first contention does not satisfy the conduct standard in the Commission’s
11 coordination regulations. Even if CFT was formed only to attack Rep. Hill, this fact alone does
12 not indicate that CFT was not acting independently but rather coordinating its attacks on Hill
13 with FMS, and therefore that CFT’s payments for its communications constituted excessive in-
14 kind contributions to FMS.

15 The second contention is limited to alleged contacts shortly before the 2006 election, and,
16 therefore, the available information does not suggest that the conduct standard may have been
17 satisfied with respect to the broadcast of CFT’s “Baron the Dodger” radio ad before the 2004
18 election.

19 Accordingly, as the available information does not indicate that the conduct standard of
20 the coordinated communications may have been met, the Commission finds no reason to believe
21 that Mike Sodrel or the Friends of Mike Sodrel and Gregory M. Fitzloff, in his official capacity
22 as treasurer, accepted excessive in-kind contributions in violation of 2 U.S.C. § 441a.

23 Consequently, the Commission also finds no reason to believe that Mike Sodrel, or the Friends

1 of Mike Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer, failed to report the
2 allegedly coordinated communications as contributions in violation of 2 U.S.C. § 434.

3 **B. Alleged Coordination with the Economic Freedom Foundation**

4 The complaint alleges that EFF is a section 527 organization that sponsored
5 "communications, including automated phone calls . . . that attacked Hill." *See* Complaint at 3.
6 The complaint further alleges that Bud Bernitt, the founder and president of CFT, "called EFF
7 during the 2006 campaign, when both Bernitt and EFF were mounting a negative campaign
8 against Hill" and that this fact "suggests that Bernitt, acting on behalf of the Sodrel campaign,
9 may have shared material information with EFF." *See* Complaint at 5. The complaint, however,
10 includes no information about the alleged EFF automated phone calls and no information
11 indicating that Bernitt had material information from the Sodrel campaign that he shared with
12 EFF.³

13 The available information indicates that the complaint is premised on a phone record
14 indicating a single phone call between Bernitt and an unmonitored telephone number assigned to
15 EFF that was listed on the EFF website and that EFF ceased making any automated calls of
16 public interest to the citizens of Indiana six days before the alleged call from Bernitt to EFF.

17 Based upon the speculative nature of the allegations as to the coordination between the
18 Economic Freedom Fund and Sodrel or the Friends of Mike Sodrel, the Commission finds no
19 reason to believe that Mike Sodrel or the Friends of Mike Sodrel and Gregory M. Fitzloff, in his
20 official capacity as treasurer, accepted excessive in-kind contributions in violation of 2 U.S.C.

³ Even assuming that the automated calls referenced in the complaint in MUR 6164 are the same as the calls addressed in MUR 5842 (Economic Freedom Fund), the Commission did not reach a majority decision in MUR 5842 as to whether the EFF phone calls expressly advocated the election or defeat of clearly identified candidates and closed the file. *See* MUR 5842 Statement of Reasons of Commissioners Peterson and Hunter and Statement of Reasons of Commissioners Bauerly and Weintraub.

1 § 441a. *See* MUR 4960 (Hillary Rodham Clinton for U.S. Senate) Statement of Reasons of
2 Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas
3 (purely speculative allegations accompanied by a direct refutation do not form an adequate basis
4 to find reason to believe that a violation of the Act occurred).

5 **C. Failure to Disclose Contributions and Expenditures Based Upon**
6 **Coordinated Communications**
7

8 The complaint alleges that FMS failed to disclose the contributions associated with the
9 allegedly coordinated communications in violation of 2 U.S.C. § 434. *See* Complaint at 5. As
10 indicated above, the available information does not indicate that there may have been
11 coordination between CFT and Sodrel or FMS. Accordingly, the Commission finds no reason to
12 believe that the Friends of Mike Sodrel and Gregory M. Fitzloff, in his official capacity as
13 treasurer, violated of 2 U.S.C. § 434 based on the allegedly coordinated communications.

14 **V. CONCLUSION**

15 The Commission finds no reason to believe that Mike Sodrel, or the Friends of Mike
16 Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer, accepted excessive in-kind
17 contributions in violation of 2 U.S.C. § 441a or failed to report contributions in violation of 2
18 U.S.C. § 434 based on allegedly coordinated communications.
19